IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER,

Petitioner,

v.

CARIBBEAN MILLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

A critical factor in this case is that the assignment and the collateral agreement are valid and enforceable under Texas law in particular and under the law generally in this country. The respondent has expressly conceded as much (Br., pp. 12, 26). Indeed, the respondent additionally acknowledges (Br., p. 26, fn. 16) that a judgment obtained in a state court premised upon such a valid assignment must be accorded full faith and credit under the Constitution. *Titus v. Wallick*, 306 U.S. 282, 289. Even the federal courts

admit the validity of this type of assignment. See *Globe Indemnity Co. v. Puget Sound Co.*, 149 F.2d 805, 809 (C.A. 2).

Where there is such a universality in the law respecting the validity of the type of assignment here involved, a federal court should not lightly assume or declare that the assignment is a "sham" or "colorable" or "improper or collusive" within the meaning of § 1359. An *Erie*-type respect for the state substantive law of assignments, a respect not demanded of federal courts in most of the pre-revision cases, cautions against an unlimited reading of the "improperly or collusively" language of § 1359. To read that language in the narrower sense suggested by Chief Judge Biggs in *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 788 (C.A. 3), is to permit such respect to be given without exposing the federal courts to the frauds upon their jurisdiction which Congress has long proscribed. The only collusive arrangements that Congress ever intended to prohibit are those that involve "frauds upon the court, and nothing more." *Williams v. Nottawa*, 104 U.S. 209, 211. As stated recently by two commentators (Lavine and Horning, *Manual of Federal Practice*, p. 63 (1967)):

> "Under 28 U.S.C. § 1359, an assignment of a cause of action to a resident of another state is effective for purposes of creating diversity jurisdiction *provided the assignment itself is valid under the applicable state law* and results in a genuine transfer of ownership. . . .
>
> "Where the assignment is real and not merely colorable, the fact that the motive for the assignment was to permit suit in federal court is immaterial." [Emphasis added.]

See also Comment, *Assignment Device in Diversity Cases*, 35 U. Cinc. L. Rev. 33 (1966).

That the assignment here was not only valid under applicable state law but resulted in a genuine transfer of ownership is evident from the following considerations:

(1) The assignment on its face divested Panama of "all of our right, title and interest, including all actions, causes of action, [and] claims" arising out of the tripartite agreement. App. 13. And the collateral agreement made clear that Kramer "is now the sole owner of any action or causes of action derivative" from the tripartite agreement, "with the independent right of management, control and prosecution thereof." App. 15. By virtue of applicable state law, which concededly validated these provisions, there was a complete divestiture of all of Panama's interest in the original agreement and any claims or causes of action arising therefrom. Following the assignment, Panama could not have brought suit against Caribbean Mills; nor could it have complained if Kramer had refused to institute or maintain a lawsuit on the assigned claim. Panama's only conceivable claim would be against Kramer if he were to refuse to pay the 95% bonus once it became due. In short, as the District Court found, the assignment "was good on its face" (App. 12) and thus effectuated a complete transfer of Panama's interests.

(2) The fact that the collateral agreement provided for a 95% "bonus" to Panama arising out of the net proceeds of any recovery by Kramer did not destroy the effectiveness or completeness of the assignment of all of Panama's interest in the tripartite agreement or in any cause of action thereunder. The collateral agreement merely confirmed that transfer and made it clear that Panama had no control whatever in respect to any lawsuit Kramer might institute. The so-called "bonus," which was actually part of the consideration for the assignment, at the least could be construed as making Kramer an assignee for collection. But such an assignment is not illegal or improper or compromised in any sense. As was said by Judge Charles E. Clark in *Rosenblum v. Dingfelder*, 111 F.2d 406, 407 (C.A. 2):

> "In modern times the assignment of choses in action has come to be thoroughly recognized, and the 'real party in interest' provision of present-day codes—repeated in Rule 17(a)—has been generally

> construed to include an assignee for collection or suit only . . . . Since the claim is owned and may be sued upon by some one, all a defendant may properly ask is such a party plaintiff as will render the judgment final and res judicata of the right sued upon."

Thus an assignee for collection, as distinguished from an agent for collection, is a "real party in interest" within the scope of Rule 17(a) of the Federal Rules of Civil Procedure. See 3A *Moore's Federal Practice*, par. 17.09 [1.-1] (1967). The collection aspects do not reflect upon the bona fides or the completeness of the assignment itself. Here, as in *Paper Makers Importing Co. v. City of Milwaukee*, 165 F. Supp. 491, 501 (E.D. Wis.),

> "The assignment was a complete and irrevocable transfer. It cannot be said that the plaintiffs are mere nominal parties, collusively lending the use of their names to create a case cognizable in the federal district court or that they as plaintiffs occupy a spurious status created by sham, pretense or other fiction."

(3) The completeness of the transfer of Panama's interests was confirmed by both the trial court and the jury. The trial judge had before her all of the testimony and documentary evidence concerning the assignment and the collateral agreement and concluded, from that record, that complete title had passed to Kramer and that the assignment was not conclusively made in order to invoke the jurisdiction of the court. App. 12. That determination is entitled to decisive weight if, as here, it is supported by substantial evidence. It was a determination made "upon facts sufficiently proven, and controlled by fixed rules of law," facts that were "made distinctly to appear on the record." *Barry v. Edmunds*, 116 U.S. 550, 566, 559.

The jury, moreover, found from the evidence before it that Panama "assigned all of its interest . . . under the May 30, 1959 Agreement to Clayton Kramer." Special Issue No. 2, App. 78. It further found that the amount of Panama's

interest thus assigned was $165,000, the total amount payable under the tripartite agreement. Special Issue No. 2-a, App. 78.

The respondent seeks to avoid the impact of these findings by asserting (Br., pp. 7-8, fn. 8) that the findings relate only to Kramer's legal title to the claim, an element of his substantive case.[1] But these determinations as to legal title also are relevant to the critical conclusions to be drawn as to the bona fides and the completeness of the assignment itself. Petitioner misspoke in his main brief to this Court (p. 51) in indicating that the jury had before it the evidence as to the collateral agreement.[2] But the jury determination that all of the interests of Panama were assigned to Kramer, not being inconsistent with the testimony as to the collateral agreement or the trial court's determination as to the non-collusive nature of the assignment, have probative value both as a matter of proof of the substantive claim and as a matter of proof of an assignment complete in nature.

(4) Th facts showing that Panama was divested of all its interests in this claim and that Panama had no control whatever over the management of the lawsuit serve to distinguish this case from those pre-revision cases relied upon by the Fifth Circuit and by the respondent where collusive transfers were found. In each of those cases, there was either an incomplete transfer of interest or a retention by the assignor of control or management of the lawsuit.

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[1]The trial court charged the jury, R. 514, that Kramer "also has the burden of establishing by a preponderance of the evidence, that Panama and Venezuela Finance Company acquired Roy Kelly's rights under the agreement and that Panama and Venezuela Finance Company assigned its rights under the agreement and Roy Kelly's rights under the agreement to him."

[2]That evidence was heard and considered by the trial judge outside the presence of the jury. App. 33. The respondent objected to that procedure and asked that the questioning take place in the presence of the jury. App. 33.

Thus in *Williams v. Nottawa*, 104 U.S. 209, the transferee conceded that he had received and held the bonds in question solely for collection, title to the bonds remaining in the transferors. In *Southern Realty Investment Co. v. Walker*, 211 U.S. 603, a sham corporation was created in South Dakota by certain lawyers solely to lend its name and citizenship to Georgia citizens who might want to sue other Georgia citizens in federal courts; no real transfer of interests was ever contemplated. The land transfer in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, was not only lacking in consideration but took place between two corporations having identical stockholders, so that the deed amounted to nothing more than a transfer of property among those same stockholders. Almost precisely the same situation was present in *Miller & Lux, Inc. v. East Side Canal & Irr. Co.*, 211 U.S. 293. See also *Lake County Commissioners v. Dudley*, 173 U.S. 243, where there was only an "apparent" transfer of bond coupons, the transferee not even knowing of the transactions in question until nine years later.

The arrangement held collusive in *Cashman v. Amador & Sacramento Canal Co.*, 118 U.S. 58, was one where the plaintiff in an injunction suit was a mere dummy, having no interest in the lawsuit and having surrendered all control of the progress and prosecution of the suit to one who was not otherwise enabled to sue in federal court. So too in *Farmington Village v. Pillsbury*, 114 U.S. 138, the transfer of coupons was arranged so that it became clear that the transferors "intended to keep the control of the whole matter in their own hands," there being no valid instrument divorcing the transferors from all control over the collection. And in *Little v. Giles*, 118 U.S. 596, the transferors (Wheeler and Burr) agreed to prosecute the suit at the expense of the transferee (Giles) and to render all necessary legal assistance for such purpose, Giles agreeing to pay all expenses and to pay to Wheeler and Burr one-third of the value of the lands recovered in the suit.

In this case, the concededly valid assignment and collateral agreement preclude any assumption or determination

that Panama retained any interest whatever in this claim or any control over the lawsuit. Those documents are not illegal or collusive on their face, and no evidence has been adduced to show that the transfer of Panama's interests was any less complete and effective than therein stated.

All that remains in this case, therefore, is the conceded motive of creating the basis for invoking federal diversity jurisdiction, a motive which is demonstrably irrelevant to the determination of what is collusive or improper under § 1359. If the assignment be valid and complete, "it makes no difference that by such transaction the transferee acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 533.[3] That motive, standing alone, cannot do service as a substitute for the "collusive" requirement of § 1359—a concept that "embraces either a fictitious or assumed state of facts in order to obtain a judicial determination or an actual existence of issues which have been corruptly arranged beforehand in order to obtain the court's determination." *Curb and Gutter Dist. No. 37 v. Parrish*, 110 F.2d 902, 907 (C.A. 8).

A few final words need be said about the respondent's suggestion (Br., p. 9, fn. 10; p. 42, fn. 13) that the writ of certiorari might be dismissed as improvidently granted in light of the overruling by the Third Circuit of its *Corabi* decision, a decision alleged by petitioner to be in conflict with the decision below (Petition, p. 7). In the first place, that conflict—which was vigorously disputed by respondent (Opp. Br., p. 11)—was not the sole conflict or the sole reason asserted why certiorari should issue. The Petition (p. 9) also alleged conflicts with decisions of the Eighth and Tenth Circuits. And more importantly, and quite apart from the alleged conflicts, the Petition (p. 10) claimed that the decision below raised significant and recurring problems

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[3] "It is not collusive to desire or prefer that action be brought in the federal court and to plan to that end without fictions or deception, provided that the plaintiff who sues has a legal right to sue." 1 *Cyclopedia of Federal Procedure*, p. 525 (3d ed., 1966).

concerning efforts to invoke and create federal diversity jurisdiction that deserved attention by this Court. The grant of certiorari may well have reflected a recognition of those important questions that have long plagued lower federal courts.

In addition, the termination of a conflict that becomes known subsequent to the grant of certiorari does not necessarily justify dismissal of the writ. There are instances where, upon closer examination, the Court has concluded that there is in fact no conflict of decisions and has thereupon dismissed the writ.[4] More frequently, the Court has simply distinguished the allegedly conflicting decision in its opinion on the merits, especially where the matter is otherwise important.[5] Of direct relevance, however, is the Court's recent action in *Switzerland Cheese Assn. v. Horne's Market*, 385 U.S. 23, 24, fn. 2, where the Court merely noted that the conflict giving rise to the grant of certiorari had disappeared subsequent to the grant by virtue of an *en banc* reversal of position by the court rendering the conflicting decision. The Court then proceeded ro resolve the merits of the case.

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[4] *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393; *Sanchez v. Borras*, 283 U.S. 798.

[5] *Barber v. Barber*, 323 U.S. 77, 79-80; *United States v. Standard Rice Co.*, 323 U.S. 106.

CONCLUSION

For the reasons expressed in this brief, supplementing those previously expressed in petitioner's main brief, the judgment below should be reversed.

Respectfully submitted,

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